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No. 94-1664

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STACEY C. KOON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE LAW ENFORCEMENT LEGAL DEFENSE FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The Law Enforcement Legal Defense Fund ("LELDF") is a national non-profit public interest law and policy center organized to support law enforcement officials through financial assistance and by promoting public awareness of the role of police and respect for the law enforcement community.

SUMMARY OF ARGUMENT

This case involves the appropriate punishment for police officers whose legal and sanctioned use of force has crossed the thin line into use of force that is considered illegal. In excessive force cases, especially those involving criminal liability, the consequences for individual police officers are severe. Officers convicted of excessive force in criminal proceedings face heavy penalties, including possible prison sentences, in addition to the loss of their position and potential future employment. In such cases, district courts must be allowed to exercise their discretion to provide "a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing. 28 U.S.C. § 3553(a).

While criminal sanctions may be appropriate for corrupt police officers or those law enforcement agents who engage in random acts of violence, criminal sanctions are too harsh in cases like this one where police officers are attempting to effect a legitimate arrest of a recalcitrant suspect and the force used is later determined to be excessive. Unlike cases of police corruption or premeditated misconduct, which are treated under the same Sentencing Guidelines, Sergeant Koon did not intentionally seek out an innocent citizen to abuse, nor did he commit aggravated assault with premeditation. Police officers who are in tense and potentially violent arrest situations, and whose use of force is later deemed excessive, should be entitled to consideration for discretionary downward departures.

Congress intended the Sentencing Commission to establish Guidelines that "maintai[n] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." 28 U.S.C. § 991(b)(1)(B). Congress intended to preserve for

the judge the discretion to depart when cases are unusual. District courts must be allowed to exercise this discretion to determine the appropriate sentence for cases that involve victim misconduct and excessive force.

ARGUMENT

I. Law Enforcement Agents Must Not Be Deterred From Using Force to Protect Themselves and the Public

Police officers face enormous challenges and responsibilities in preventing crime, keeping the peace and apprehending criminals. As reported by the United States Civil Rights Commission in its review of police use of force:

> Police officers possess awesome powers. They perform their duties under hazardous conditions and with the vigilant public eye upon them. Police officers are permitted only a margin of error in judgment under conditions that impose high degrees of physical and mental stress. Their general responsibility to preserve peace and enforce the law carries with it the power to arrest and to use force -- even deadly force.[1]

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[1] United States Civil Rights Com'n, Who is Guarding the Guardians at v (1981), cited in Geoffrey P. Alpert and William C. Smith, *Criminology: How Reasonable is the Reasonable Man?: Police and Excessive Force*, 85 J. Crim. L. 481 (Fall, 1994).

The standards for excessive force cases must take into account the challenges and pressures that police officers face.

Every contact an officer makes with a suspect is fraught with danger. Even in routine traffic stops, police officers are presented with a vast array of unknown factors: is the driver armed, on drugs, violent? In 1992 alone, over 80,000 law enforcement officers were assaulted; 7,251 of these assaults occurred while a police officer was making a traffic pursuit or stop.[2]

When a suspect resists arrest, attempts to escape, appears to be on drugs, or otherwise seems to pose a danger to the officers or innocent bystanders, police officers must do what is necessary to apprehend the suspect, which may very well involve the use of force. This force may later be deemed criminally excessive or, at the very least, expose the police officer to civil liability. If a law enforcement agent's conduct is deemed to have constituted illegal force, the consequences are high -- the police officer can face prison, loss of position, and financial penalties.

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2 *Bureau of Justice Statistics Sourcebook of Criminal Justice Statistics* 1993 ("Sourcebook") at 406 (Table 3.161), citing U.S. Department of Justice, Federal Bureau of Investigation, *Law Enforcement Officials Killed and Assaulted, 1992*, p. 65, FBI Uniform Crime Reports (Washington, DC: USGPO). In the years 1978 to 1992, almost 1,200 police officers were killed on the job. Of those, 165 were killed during traffic pursuits or traffic stops. *See* Sourcebook at 401 (Table 3.154).

If a police officer is not forceful enough, however, he or she may face equally severe consequences -- failing to use adequate force risks injury, not only to the police officer, but also to partners or innocent bystanders. If officers are overly concerned with the possible sanctions for excessive force, they may not be able to provide adequate protection for citizens.

There is evidence that fear of civil liability is causing police officers to have second thoughts about any confrontations. Riverside police union President Jack Palm recently sent a memorandum to union members urging them to consider the potential economic effect before initiating any police action.[3] Palm noted that "[t]here's a saying among police officers, 'if you haven't been to federal court at least once, you will soon.'" Responding to this concern, Congressman Carlos Moorhead (R-Calif.) sponsored a bill to make it tougher for juries to levy punitive damages against police officers in civil suits. In promoting the legislation, he declared: "It is not in the interest of society if police officers get timid . . . . These are people with very dangerous jobs out there fighting for us in the streets . . . . These lawsuits are bound to deter the aggressiveness in which they carry out their jobs." *Id.*

If fear of civil liability is deterring police officers' necessary use of force, the threat of criminal liability and the dramatic consequences arising therefrom provide an even stronger disincentive to using force when it is necessary. To prevent perverse incentives, district courts should -- and under the clear words of the Sentencing

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3 Marc Lacey, *Moorhead Seeks Limit in Suits Against Police*, Los Angeles Times, August 15, 1995, at A1.

Guidelines do -- have discretion in excessive force cases to take into account the nature of police work in determining whether the case warrants a departure from the sentence that would otherwise be imposed.

II. Unless District Courts are Allowed Discretion, Sentences of Police Officers in Excessive Force Cases Will be too Severe

Police officers routinely must use force to apprehend suspects and control prisoners. In a recent survey of over 1000 law enforcement agencies, the 198 city police departments providing responses reported 4,425 incidents of bodily force during 1991.[4] City police departments also reported 36.2 incidents of use of batons per 1000 officers, 490.4 incidents of handcuffs/leg restraints per 1000 officers, and 126.7 incidents of swarming a suspect per 1000 officers during 1991.[5]

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4 Antony M. Pate and Lorie A. Fridell, *Police Use of Force: Official Reports, Citizen Complaints and Legal Consequences* (1993), Appendix at B-3.1. This survey was conducted by the Police Foundation, a nonprofit research group, with the support of the National Institute of Justice. To standardize the absolute number of reported incidents of the use of force, the study created an indicator representing the number of incidents reported for every 1000 sworn personnel. For city police departments there were 272.2 incidents of bodily force per 1000 officers in 1991. *Id.* at 74 (Table 6.1).

5 *Id.* at 74 (Table 6.1). Swarming is a technique in which several officers surround, immobilize, and handcuff a suspect. *Id.* at 63.

The legitimate use of force necessarily carries with it the possibility that officers may use excessive force. In 1991, 568 city police departments reported over 13,800 citizen complaints of excessive force, which represents 47.5 complaints per 1000 sworn officers.[6] The 219 city police departments that kept records of civil suits reported almost 1900 such suits, which represents 23.7 civil suits based on excessive force per 1000 sworn officers.[7]

Society expects and requires law enforcement agents to use force to deal with criminals. The sanctions for police officers who use excessive force, therefore, must be strict enough to deter behavior that is considered beyond what is reasonable in the situation, but not so severe as to deter the use of force when it is necessary to ensure the safety of both law enforcement agents and the public. Criminal sanctions are not necessarily appropriate:

> In some cases, the criminal law might appear to be too harsh an instrument to use against a police officer even if he did, in fact, use excessive force. In this regard it is useful to note that a high percentage of excessive force claims arise in the context of an arrest, sometimes after a harrowing car chase or in the midst of impending violence or unstable surrounding circumstances. Although it might be appealing simply to say, `let a jury decide,' the very use of the criminal law carries a

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6 *Id.* Appendix at Table B-11.1, 107 (Table 10.1.).

7 *Id.* Appendix at Table B-37, B-38.1.

reputational, psychological, and possibly a monetary penalty to the defendant.[8]

As a general rule, our society should rely upon administrative sanctions and civil remedies for police officers whose use of force to make a lawful arrest is determined to be excessive. Criminal sanctions should be reserved primarily for situations where police officers engage in the unlawful use of force for corrupt purposes or without provocation. However, to the extent criminal sanctions are imposed on police officers whose use of excessive force occurs in the context of a legitimate law enforcement activity, then the district court should be allowed the discretion intended by Congress and the Sentencing Guidelines to impose a sentence that is appropriate to the circumstances.

A. Application of the Sentencing Guidelines in Excessive Force Cases

Under the Sentencing Guidelines, police officers charged with excessive force face criminal liability based on violation of 18 U.S.C. § 242, the crime of interference with civil rights under color of law.[9] *See United States v Masserlian*, 832 F.2d 778 (3d Cir. 1987) (convicting state

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[8] Mary Cheh, Are Law Suits an Answer to Police Brutality, in *And Justice For All: Understanding and Controlling Police Abuse of Force*, at 233, 241 (William A. Geller and Hans Toch, eds., 1995).

[9] This crime involves a maximum term of ten years if bodily injury results. *See* § 2H1.4. Police officers can also be found criminally liable under 18 U.S.C. § 241 for conspiracy to interfere with civil rights.

trooper under 18 U.S.C. § 242 in excessive force case), *cert. denied*, 485 U.S. 988 (1988). Proof of the crime of deprivation of civil rights under § 242 requires proof that the defendant had the specific intent to deprive the victim of a right under the Constitution. *United States v. Epley*, 52 F.3d 571 (6th Cir. 1995).

Under the Sentencing Guidelines, the base offense level for violations of § 242 is the greater of 10 or 6 plus the offense level applicable to any underlying offense. § 2H1.4. Therefore, police officers sentenced under this provision, regardless of the circumstances of their conduct, are treated more harshly than a criminal defendant who commits the same underlying offense. In Mr. Koon's case, for example, the district court reached a final offense level of 27 based principally on its determination that the underlying offense was aggravated assault.

Aggravated assault is defined as a "felonious assault that involved (a) a dangerous weapon with intent to do bodily harm (*i.e.* not merely to frighten), or (b) serious bodily injury, or (c) an intent to commit another felony." *See* § 2A2.2, Commentary, Application Note 1. The district court found that Mr. Koon was guilty of aggravated assault based on Officer Powell's conduct.

Aggravated assault carries a base offense level of 15. In Mr. Koon's case, the court increased the base offense level due to certain specific offense characteristics. Specifically, the court determined that: 1) because a dangerous weapon was "otherwise used," the base offense level was increased by 4; and 2) because the victim sustained bodily injury, the base offense level was increased by 2. The final base offense level for aggravated assault

was thus 21, which when added to 6, as required by § 2H1.4(a)(2) resulted in a final base offense level of 27.[10]

Despite the fact that Officer Koon was acquitted of assault charges in the state trial, the district court sentenced him on the basis of the underlying conduct of aggravated assault in addition to the base offense level for the crime for which he was actually convicted, interference with civil rights under color of law. Moreover, the district court added to the base offense level for Mr. Powell's use of a "dangerous weapon."[11]

The sentence for this conduct was too severe given the circumstances. The district court recognized that this case fell outside the "heartland" of cases involving interference

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10 Under the Sentencing Guidelines, an offense level of 27 combined with a Criminal History category of I results in a sentence range of 70-87 months. By comparison, the median sentence of incarceration imposed by State courts for aggravated assault in 1990 was 24 months. *Sourcebook* at 529 (Table 5.53).

11 Police officers are required to carry "dangerous weapons" and often must use them. It is unfair to train law enforcement agents to use batons or firearms, require officers to carry these "dangerous weapons," and then penalize the officers for using them in a situation where their use begins as legitimate force, but at some point during the encounter is deemed excessive. Unlike defendants who have no legitimate reason for carrying a dangerous weapon, police officers should not be subject to greater penalties for making a good-faith effort to comply with the demands of their job. In all of Sergeant Koon's testimony, he stated that he believed he used the proper, authorized techniques to bring a resisting suspect into compliance.

with civil rights and departed accordingly. The district court's decision to downwardly depart should be affirmed.

B. Inadequacy of the Guidelines Without Discretionary Downward Departures

The Sentencing Guidelines do not differentiate between the case of excessive force that begins as lawful conduct but is later determined to have constituted, at least in part, illegal force and cases where the use of force was unlawful *ab initio*.

For example, the same Sentencing Guidelines apply to Sergeant Koon's conviction of violation of civil rights for the nineteen seconds he did not control the illegal conduct of Officers Powell and Wind as apply to a police guard who intentionally seeks out a prisoner to assault with a dangerous weapon or a police officer who stops a car with the intent to harass and beat the driver. *See United States v. Simon*, 964 F.2d 1082 (11th Cir. 1992) (affirming conviction under 18 U.S.C. § 241 for conspiracy to violate constitutional rights, where police officers planned to rob a drug dealer, found no drugs or money, and killed drug dealer and his companion), *cert. denied*, 113 S. Ct. 1854 (1993). The culpability, however, is vastly different. Police officers who are involved in premeditated and corrupt behavior, such as planning and committing a robbery or murder of a drug dealer, should be severely sanctioned. Where police officers use force in a legitimate setting, however, the district court has discretion to depart from the Guidelines range and appellate courts should defer to the district court's "superior `feel' for the case." *United States v. Rivera*, 994 F.2d 942, 950-51 (1st Cir. 1993).

Here, Sergeant Koon was found criminally liable of aggravated assault for about nineteen seconds of "illegal behavior" by Officers Powell and Wind following over one

minute of legal force used to restrain a suspect who resisted arrest and who Sergeant Koon reasonably could have believed was "under the influence of PCP because of [his] erratic and recalcitrant behavior." Pet. App. at 101a. Sergeant Koon's liability stems from his failure to prevent unlawful application of force against Mr. King by other police officers. He did not use or threaten force himself.

The district court's determination of when Mr. Koon's behavior turned from legal force in effecting a legal arrest to illegal deprivation of civil rights involved an extremely detailed description of events that occurred over less than a minute and a half. In the end, the district court determined that there was very little "illegal behavior" during the arrest situation: "Messrs. Koon and Powell were convicted of conduct which began as a legal use of force against a resistant suspect and subsequently crossed the line to unlawfulness, all in a matter of seconds, during the course of a dynamic arrest situation." Pet. App. at 123a.

For example, the Sentencing Guideline used for the underlying offense conduct for which Sergeant Koon was sentenced, aggravated assault, is the same guideline that would apply to a prisoner who attacks another inmate with a table leg. *See United States v. Hernandez-Fundora*, 58 F.3d 802 (2nd Cir. 1995) (affirming conviction of aggravated assault and sentence based on § 2A2.2). The culpability of a police officer who is trying to do his job and goes too far is much less than that of a criminal defendant who premeditates and intends to commit a crime. Police officers who use force to apprehend recalcitrant suspects should not be treated the same as prison inmates who randomly attack other inmates. In this case, because the police officers' initial contact with Rodney King was legal and because the officers did not commit any crime

with premeditation, it is appropriate to allow district courts to consider a discretionary downward departure.

The Sentencing Guidelines are designed to allow district judges to recognize differences in culpability and moderate sentences accordingly. Police officers who, like Sergeant Koon, are convicted of violations of civil rights for conduct which began as lawful and authorized, should be entitled to consideration for discretionary downward departures. Otherwise, an unintended unfairness will result as these police officers will be treated the same as defendants whose culpability is significantly greater.

III. The District Court Relied Upon Appropriate Factors For Discretionary Downward Departures Under the Sentencing Guidelines

The District Court based its departures, in part, on victim misconduct and on the additional punishment faced by Sergeant Koon as a result of the trial and sentence. Based on the nature of excessive force cases and the need to provide proper incentives to police officers, appellate courts should respect decisions to downwardly depart in all cases where a police officer begins by using legitimate force to effect a legal arrest but, at some point in time, the conduct is deemed to have been excessively forceful.

A. Victim Misconduct

The Sentencing Guidelines specifically and expressly authorize downward departures based on victim misconduct. "If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense." § 5K2.10 (Policy Statement). The Guideline does not require that the provocation be immediately followed by a

response. The opposite is true. The Guideline provides that a continued course of provocation can eventually lead to a response that may be the basis for a downward departure. A departure may be warranted, even in a case involving a non-violent offense, following "an extended course of provocation and harassment." § 5K2.10 (Policy Statement). Courts are specifically instructed to consider: "any other relevant conduct by the victim that substantially contributed to the danger presented." § 5K2.10(e) (Policy Statement).

If a non-police defendant can receive a downward departure when provoked, a police officer whose conduct begins as legal and reasonable force, but crosses the line to illegal conduct because of provocation by the suspect, should also receive such a departure. Indeed, police officers are more deserving of consideration for departures in these situations.

Volatile and potentially violent situations are part of a police officer's job. When law enforcement agents use force in effecting a legal arrest, they do so not because they have picked a fight or because they are attempting robbery or manslaughter, but because they must use force to do their job. It is unfair to require police officers to use force and then refuse to allow district courts discretion to give more lenient sentences to those officers as compared to defendants who commit assault with premeditation.

This is not a situation where a police officer assaults an innocent bystander for no reason, nor is it a situation in which a corrupt police officer shakes down a drug dealer for drugs to sell the drugs for his own profit. It is therefore proper for the district court to make a downward departure.

The Ninth Circuit majority opinion in a strained interpretation of the district court's fact-finding for

sentencing purposes, restated the district court's fact-finding by concluding that the court did not find officers Koon and Powell were provoked in "precisely the manner contemplated by § SK2.10." Pet. App. at 70a. Victim misconduct is built into the *Graham* test for evaluation of excessive force claims under the Fourth Amendment. *See* Pet. App. at 73a. In *Graham v. Connor*, the Supreme Court recognized that

> [t]he calculus of reasonableness must embody allowances for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain and rapidly evolving -- about the amount of force that is necessary in a particular situation.

490 U.S. at 396-97, 109 S. Ct. at 1872. While the dynamic arrest situation may already be considered in determining liability under *Graham*, that does not mean a district court cannot rely on the nature and quality of police use of force to downwardly depart in sentencing. Simply because a factor is considered in determining liability does not forbid the use of that factor in sentencing. For example, self-defense or battered-woman syndrome may be rejected as a complete defense to liability for murder, but evidence of victim misconduct can still be considered at sentencing. *See United States v. Whitetail*, 956 F.2d 857, 863-64 (8th Cir. 1992) ("the fact that the jury rejected Whitetail's claim that she acted in self-defense did not remove from the District Court its discretion to consider at sentencing her battered-woman evidence as a basis for departure [under § 5K2.10] from the guidelines").

Victim misconduct is expressly encouraged as a factor to consider. The district court's discretionary downward departure based on victim misconduct should be affirmed.

B. Additional Punishment Inherent in the Sentence

The district court based its departure, in part,[12] on two categories of additional punishment: "(1) the defendant's extreme vulnerability to prison abuse; and (2) the defendant's exposure to additional adversarial proceedings as a result of his conviction." Pet. App. at 124a. This departure is consistent with the Sentencing Guidelines and should be affirmed.

The district court's departure based on vulnerability to prison abuse is due to the defendant's status as a police officer: "[T]he widespread publicity and emotional outrage which have surrounded this case from the outset, in addition to the defendants' status as police officers, lead the Court to find that Koon and Powell are particularly likely to be targets of abuse during their incarceration." Pet. App. at 125a. If the vulnerability to abuse were related to the nature of the offense, such as might be the case for a child molester, it would not be reasonable to allow a downward departure. Those who commit especially heinous crimes should not get lighter sentences simply because they are especially hated.

But the vulnerability a police officer faces is different. Prisons are full of people who have been arrested by police officers. The district court's determination that police officers face a higher chance of abuse in prison is reasonable.

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12 The district court relied on a combination of factors, including the fact that Sergeant Koon posed no criminal threat in the future and the "spectre of unfairness" created by successive state and federal prosecutions as well as the additional punishment inherent in the sentence.

A police officer should be treated the same as any other defendant whose physical characteristics make them more susceptible to abuse. The police officer's status as a law enforcement agent, just like the status of someone who is physically small or immature, makes them more vulnerable to abuse. *See United States v. Gonzalez*, 945 F.2d 525 (2d Cir. 1991) (affirming departure for a defendant who was small, feminine-looking, and had the appearance of a fourteen year old); *United States v. Lara*, 905 F.2d 599 (2d Cir. 1990) (affirming departure for a defendant who was small, appeared immature, and was bisexual, leading prison officials to place him in solitary confinement for his own protection). Every police officer should be eligible for consideration for a downward departure, just like every defendant whose physical status makes him more vulnerable to abuse is eligible. In neither case is it a "reward" for having the status of a small, immature person or the status of a law enforcement agent. Rather, eligibility for consideration of a downward departure is just a reflection of the fact that the punishment is more severe for those whose status makes them more likely to suffer abuse in prison.

The court also relied on the additional adversarial proceedings that Sergeant Koon would face as a result of his conviction. The professional consequences to Sergeant Koon are severe, as noted by the District Court: 1) "the LAPD Board of Rights will charge Koon and Powell with a felony conviction and, in a quasi-judicial proceeding, will strip them of their position and tenure" and (2) "Koon and Powell will be disqualified from other law enforcement careers." Pet. App. at 127a (footnotes omitted).

The Ninth Circuit majority contends that additional adversarial proceedings are not a permissible basis for departure because they are "not a circumstance that spoke

to the offense in question or to the offender's character." Pet. App. at 61a. The Ninth Circuit "refuses to permit departures based on factors that do not speak to the offender's character, the nature or seriousness of the offense, or some other legitimate sentencing concern." Nothing in the Sentencing Guidelines, however, limits departures this way.

Even if it were true that district courts can only depart if factors "speak to the nature and seriousness of the defendant's crime or to his culpability," personal and profession consequences that stem from a criminal conviction are tied to a penological purpose or legitimate sentencing concern. If part of the purpose of sentencing is just punishment or deterrence, those defendants who face additional adversarial proceedings as a result of their conduct will necessarily receive greater punishment and deterrence as a consequence. Recognizing the impact of such proceedings is a realistic and appropriate consideration in determining what sentence should be imposed by the court.

The district court's discretionary downward departure based, in part, on the additional punishment Sergeant Koon will face should therefore be affirmed.

IV. The LELDF Endorses the Standard Proposed by Petitioner

The Petitioner's Brief proposes that sentencing departures should be reviewed by appellate courts only for abuse of discretion. The district court is the finder of facts and must apply the facts to the Guidelines. Appellate courts should recognize the district court's superior feel for the case, and give deference to the district court's departure decisions.

Under this standard, which the LELDF endorses, the sentence imposed by the District Court should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed and the sentence imposed by the District Court should be reinstated.

Respectfully submitted,

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